No. 83-747

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,
Petitioner,

v.

PAUL D. JOHNSON, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR THE PETITIONER

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QUESTIONS PRESENTED

1. Whether the builder of an interstate rapid transit system that purchases compensation benefits for injured laborers, pursuant to its obligation under a federally-approved interstate compact to act as general contractor, is entitled to the statutory immunity from suit granted to contractors by the Longshoremen's and Harbor Workers' Compensation Act, or whether, as held by the District of Columbia Circuit, injured employees may recover both compensation and damages from the builder.

2. Whether the builder forfeits its statutory immunity from suit simply because it initially purchased workers' compensation protection for all construction employees rather than first demanding that contractors—many of whom were uninsurable—themselves obtain workers' compensation insurance.

PARTIES TO THE PROCEEDINGS

Paul D. Johnson, Howard L. Eighmey, Calvin Walker, Rena Walker, John Warren Clanagan, Stanley Wilmes, James H. Buchanan, Shirley Buchanan, and Glenwood Williams* were appellants in the seven cases consolidated in the United States Court of Appeals for the District of Columbia Circuit.

The Washington Metropolitan Area Transit Authority, Bechtel Associates Professional Corp., D.C., and Bechtel Civil and Minerals, Inc., were appellees in all cases before the Court of Appeals.†

Appearing in the District Court at the initial stages of the litigation but not in the Court of Appeals were Gordon H. Ball, Inc., S. A. Healy Co., Granite Construction Co., James McHugh Construction Co., McLean, Grove & Skanska, Fruin-Colnon Construction Co., Horn Construction Co., J. F. Shea Construction Co., Morrison-Knudsen Contractors, Shea-S&M Joint Venture and Slattery Associates, Inc.

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* Glenwood Williams was a respondent to the petition but is no longer a party to the case (*see* note 15, *infra*).

† Bechtel Associates Professional Corp., D.C., and Bechtel Civil and Minerals, Inc., are affiliates of Bechtel Group, Inc. Other affiliates of Bechtel Group, Inc., include Bechtel Power Corp., Bechtel Petroleum, Inc., Bechtel Investments, Inc., and Bechtel Professional Corp., Virginia.

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The decisions of the United States District Court for the District of Columbia granting WMATA's motions for summary judgment (Pet. App. 1a-31a) are not officially reported. The decisions of the District Court denying plaintiffs' motions for postjudgment relief under Fed. R. Civ. P. 59(e) and 60(b)(3) (Pet. App. 32a-36a) are not officially reported. The decision of the United States Court of Appeals for the District of Columbia Circuit (Pet. App. 37a-64a) is reported at 717 F.2d 574. The orders of the Court of Appeals denying a Petition for Rehearing and a Suggestion for Rehearing En Banc (Pet. App.

65a, 66a) are not officially reported. The Court of Appeals' Order staying issuance of its mandate to November 7, 1983, pending the filing of a petition for a writ of certiorari (Pet. App. 67a) is not officially reported.

JURISDICTION

The Court of Appeals' decision in these cases was rendered on August 19, 1983 (Pet. App. 41a). A timely Petition for Rehearing and Suggestion for Rehearing En Banc was filed on September 2, 1983, and denied on October 3, 1983 (Pet. App. 65a, 66a). The petition for a writ of certiorari was filed on November 4, 1983, and was granted on January 16, 1984 (J.A. 332). The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1) (1976).

RELEVANT STATUTES

Section 4 of the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C. § 904 (1976)) provides:

> (a) Every employer shall be liable for and shall secure the payment to his employees of the compensation payable under sections 907, 908, and 909 of this title. In the case of an employer who is a subcontractor, the contractor shall be liable for and shall secure the payment of such compensation to employees of the subcontractor unless the subcontractor has secured such payment.
>
> (b) Compensation shall be payable irrespective of fault as a cause for the injury.

Section 5 of the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C. § 905 (1976)) provides, in part:

> (a) The liability of an employer prescribed in Section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such em-

ployer at law * * * on account of such injury or death * * *.

Section 38(a) of the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C. § 938(a) (1976)) provides:

> Any employer required to secure the payment of compensation under this chapter who fails to secure such compensation shall be guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not more than $1,000, or by imprisonment for not more than one year, or by both such fine and imprisonment; and in any case where such employer is a corporation, the president, secretary, and treasurer thereof shall be also severally liable to such fine or imprisonment as herein provided for the failure of such corporation to secure the payment of compensation; and such president, secretary, and treasurer shall be severally personally liable, jointly with such corporation, for any compensation or other benefit which may accrue under the said chapter in respect to any injury which may occur to any employee of such corporation while it shall so fail to secure the payment of compensation as required by section 932 of this title.

District of Columbia Code § 36-501 (1973) provides:

> The provisions of Chapter 18 of Title 33, U.S. Code, including all amendments that may hereafter be made thereto, shall apply in respect to the injury or death of an employee of an employer carrying on any employment in the District of Columbia, irrespective of the place where the injury or death occurs; except that in applying such provisions the term "employer" shall be held to mean every person carrying on any employment in the District of Columbia, and the term "employee" shall be held to mean every employee of any such person.

Article V, Section 12 of the Washington Metropolitan Area Transit Authority Interstate Compact (Pub. L. No. 89-774, 80 Stat. 1324 (1966)) provides, in part:

12. In addition to the powers and duties elsewhere described in this Title, and except as limited in this Title, the authority may:

(d) Construct * * * real and personal property * * * but all of said property * * * shall be necessary or useful in rendering transit service or in activities incidental thereto; * * *

(f) Enter into and perform contracts * * * with any person, firm or corporation * * * including, but not limited to, contracts or agreements to furnish transit facilities and service; * * *

(i) Contract for or employ any professional services; * * *

(m) Exercise * * * all powers reasonably necessary or essential to the declared objects and purposes of this Title.

STATEMENT

These seven cases [1] present a single issue for the Court's resolution: whether the Washington Metropolitan Area Transit Authority ("WMATA") may be held liable in tort for injuries to employees of its subcontractors which have already been redressed through the applicable workers' compensation statute. The issue turns on two provisions of the Longshoremen's and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. §§ 904 and 905 (a), that were adopted by the Congress in 1927 and incorporated the following year into the District of Columbia Workmen's Compensation Act ("DCWCA"), D.C. Code §§ 36-501 and -502 (1973).[2] WMATA's reliance on

[1] The Court of Appeals consolidated the seven cases and expedited their appeal (Pet. App. 41a n.1).

[2] Although a new District of Columbia statute went into effect on July 26, 1982 (Act of July 1, 1980, D.C. Law 3-77, 27 D.C.R. 2503 (codified at D.C. Code Ann. § 36-301 *et seq.*)), that Act adopts the relevant language of LHWCA Sections 904(a) and 905(a) as Sections 36-303(c) and 36-304(a) of the new District of Columbia Workers' Compensation Act.

those sections, and the lower courts' construction of them, are described below.

WMATA's Authority and its Provision for Workers' Compensation Coverage

WMATA is a governmental agency created by an interstate compact (the "WMATA Compact"); the Compact was enacted and consented to by Congress [3] and adopted by the concurring legislation of the states of Maryland and Virginia.[4] The WMATA Compact authorized and obligated WMATA to construct an interstate rapid transit system, colloquially known as "the Metro." To avoid having an unnecessary permanent construction staff of its own at the completion of the project, WMATA exercised its option [5] to subcontract various portions of the Metro System (J.A. 213-214, 238, 250-252, 277). At the same time, however, WMATA retained overall control of the entire construction process through its Department of Design and Engineering, the office responsible for supervising, monitoring, and controlling all of the work performed by WMATA's numerous subcontractors (J.A. 162-184, 272, 275-277).

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[3] Washington Metropolitan Area Transit Authority Interstate Compact, Pub. L. No. 89-774, 80 Stat. 1324 (1966). Congress enacted the WMATA Compact acting as the local legislature for the District of Columbia (*see* U.S. Const. art. I, § 8, cl. 17), and it consented to the WMATA Compact acting as the national legislature, U.S. Const. art. I, § 10, cl. 3. *See also WMATA v. One Parcel of Land*, 706 F.2d 1312, 1316 (4th Cir.), *cert. denied*, 104 S. Ct. 238 (1983); *Morris v. WMATA*, 702 F.2d 1037, 1041 (D.C. Cir. 1983); *Qasim v. WMATA*, 455 A.2d 904, 906 (D.C.), *cert. denied*, 103 S. Ct. 2090 (1983).

[4] *See* Ch. 2, 1966 Va. Acts of Assembly, Va. Code Ann. § 56-529 (1981); Ch. 869, Acts of General Assembly 1965, Md. Code Ann. [Transportation] § 10-204 (1977); *see* D.C. Code Ann. § 1-2431 (1981); *see also* J.A. 190.

[5] Section 12 of the WMATA Compact authorized WMATA to delegate or subcontract portions of its construction obligation to others.

Phase I of the construction project began on December 9, 1969, and continued through July 30, 1971 (J.A. 261). During that period, WMATA engaged approximately a dozen subcontractors, who in turn engaged several dozen sub-subcontractors, each of whom was expected to purchase workers' compensation insurance for its immediate employees (*id.*). In practice, however, employees were at times left without coverage when individual policies lapsed—either because employers failed to make timely premium payments or because the insurance company involved went out of business (J.A. 265, 285, 299). While WMATA attempted to monitor the insurance status of its various subcontractors and sub-subcontractors to ensure that all Metro construction employees were protected at all times, the task proved impossible; there was simply no way to guarantee that WMATA would be notified of all potential lapses in coverage (J.A. 263). The inevitable result was that some employees were left without any workers' compensation coverage (J.A. 263-265).

Phase II of the construction project began on July 31, 1971 (J.A. 261). At that time, WMATA accelerated construction of the Metro and engaged literally hundreds of subcontractors who, in turn, engaged sub-subcontractors with thousands of employees—all subject to workers' compensation coverage under the LHWCA and DCWCA (J.A. 263). For essentially three reasons, WMATA determined in 1971 that it could no longer meet its statutory responsibilities by relying on the hope that each of the hundreds of subcontractors (and sub-subcontractors) would acquire and maintain the necessary compensation coverage.

First, as described above, WMATA's experience during Phase I had demonstrated that its subcontractors and their sub-subcontractors on occasion failed to secure and maintain workers' compensation coverage for their employees, resulting in periods in which those employees were not protected by such compensation. Moreover, in practice it was impossible for WMATA to be timely noti-

fied of all lapses in coverage so as to supply the necessary coverage itself (J.A. 263, 285). Not only were these inevitable gaps in coverage undesirable from the employees' perspective, but WMATA officials feared that those gaps would constitute a direct violation of the LHWCA, subjecting them to civil and criminal sanctions (J.A. 263-265, 299): Section 904 of that Act obliges a general contractor to "secure"[6] compensation benefits for any employee that the subcontractor has not already covered, and Section 938 makes any failure to so secure a misdemeanor punishable by a $1,000 fine and a one-year prison term. These penalties apply not only to the company but to its officers as well.

Second, WMATA was (and is) obligated by law to provide minority contractors a maximum opportunity to participate in the construction of the federally-financed Metro Transit System.[7] Because such contractors often could not (and still cannot) obtain insurance at competitive rates from established, dependable insurance firms, they would have been unable to make successful bids for WMATA's projects unless they turned to unreliable, often prohibitively expensive, "fly-by-night" insurance companies for coverage (J.A. 285). The necessary result was either that such minority contractors would not be awarded contracts or, if they were, that their employees' compensation coverage would not be reliable.

Finally, WMATA had learned that the insurance industry simply would not provide individual insurance policies for compensation coverage and general liability coverage up to the required $50 million limit for each of its hundreds of subcontractors and their sub-subcontractors (J.A. 286). That problem was not unique to WMATA;

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[6] "Securing" coverage is accomplished either by "insuring and keeping insured" the payment of compensation, or by qualifying as a self-insurer. 33 U.S.C. § 932(a).

[7] *See* discussion in Part IV.C. of our argument at pp. 44-46, *infra*.

every major transit construction project has confronted the unwillingness of the insurance industry to provide separate insurance policies for hundreds of insureds subject to common risks in one narrow geographic area (J.A. 286). Moreover, WMATA also determined that even if *all* of its subcontractors and their sub-subcontractors could have obtained compensation coverage to protect *all* Metro construction employees, the cost to the public of acquiring that coverage would be greater than if WMATA itself simply purchased a single policy to cover *all* those employees.[8]

Based on its described obligations to ensure workers' compensation coverage, to employ minority-run companies, and to accomplish Metro's construction through the most efficient use of public funds, WMATA concluded that the only responsible approach was to purchase one, comprehensive "wrap-up" (or "wrap-around") policy[9] to provide compensation coverage for *all* Metro construction employees (J.A. 263-266, 285-286, 299). Under the policy which WMATA purchased, it alone was responsible for paying compensation premiums, and WMATA's insurance carrier, Lumberman's Mutual Casualty Company ("LMC"), was responsible for making all compensation payments (J.A. 79-85, 269-271, 282).[10] At the same time, however, the bid specifications submitted to each of WMATA's subcontractors made clear that each

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[8] J.A. 264. For example, a study conducted for the Department of Transportation estimated that WMATA's wrap-up program saved the public in excess of $32 million during 1971-1976. Barrett, *Insurance for Urban Transportation Construction*, Report No. UMTA-MA-06-0025-77-13, at 3-18 (Dept. of Transp. 1977).

[9] A "wrap-up policy" is "[a] tailored contract mainly for big construction projects where one policy is provided to cover all involved interests—the owner, the contractor, subcontractors, suppliers, etc." G. Heath, *Insurance Words And Their Meanings* 127 (11th ed. 1975).

[10] The payment program was administered by National Loss Services Control Co., a subsidiary of Lumberman's Mutual Casualty Company, WMATA's insurance carrier (J.A. 81-83).

could obtain whatever insurance it thought necessary (J.A. 283). Thus, WMATA's wrap-up program assured coverage for any employees whose immediate subcontractor (or sub-subcontractor) elected not to purchase (or failed to maintain) its own workers' compensation insurance (J.A. 283-285). The described compensation coverage was in place at the time of each respondent's claimed injuries, and is still in effect today (J.A. 23-46).

Respondents' Suits Against WMATA

Respondents are all employees of subcontractors that WMATA engaged to build the Metro transit system during Phase II.[11] Every respondent filed a compensation claim for injuries allegedly sustained while working on the Metro project,[12] and all had received compensation payments or awards from WMATA's insurance carrier (LMC) (as much as $120,000) when these suits were filed.[13] In these suits, each respondent sought to supplement his compensation award by recovering tort dam-

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[11] In three of the cases in the District Court, both the employee and his wife filed suit. Because an employee's spouse may not bring suit where the employee himself is barred (33 U.S.C. § 905(a); *see, e.g., Hilton v. Fifteen Hundred Massachusetts Ave., Inc.*, 261 F.2d 377, 378 (D.C. Cir. 1958)), we will refer to the employees alone as respondents.

[12] Most of the respondents' claims for compensation were based on respiratory injuries allegedly sustained from exposure to dust and other pollutants (Pet. App. 42a).

[13] J.A. 47-67. The Court of Appeals' statement (Pet. App. 42a) that each respondent had recovered a compensation award by the time of its decision, while technically correct, is misleading in one minor respect. All respondents except Buchanan and Wilmes had received compensation lump sum awards at the time their lawsuits were filed (the awards totaled $388,055, or an average of $64,376 per respondent). While Buchanan had received a total of $60,000 for two prior claims closely related to this case, and had also filed a claim for compensation here, the latter claim is not being pressed by his counsel at this time. Wilmes is presently receiving temporary partial benefits.

ages from WMATA based on the same injuries for which WMATA's insurance carrier had already paid compensation.[14] In response to the suits, WMATA moved for summary judgment on the ground, *inter alia*, that it was immune from tort liability under LHWCA Sections 904 and 905(a).[15]

The District Courts' Decisions

Each of five District Court judges (Corcoran, Flannery, June Green, Richey, and Smith, JJ.) granted WMATA's motions for summary judgment, ruling that WMATA was immune from respondents' suits (Pet. App. 1a-31a). The judges found that WMATA was the overall general contractor for the Metro transit sys-

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[14] Respondents also sued WMATA's agents, Bechtel Associates Professional Corporation, D.C., and Bechtel Civil and Minerals, Inc. ("Bechtel"). The District Court judges dismissed the suits against Bechtel on the ground that Bechtel was immune from suit under Section 80 of the WMATA Compact as WMATA's agent, and the Court of Appeals affirmed (*see* Pet. App. 43a-49a). *See* D.C. Code Ann. 1-2431[80] (1981). Respondents did not cross-petition for review of that judgment, and the issue is therefore not before the Court.

[15] WMATA also asserted that it had been improperly added as a third-party defendant under Fed. R. Civ. P. 15(c) in four of the seven cases. The Court of Appeals declined to rule on that issue, and left it for further factual development by the District Court (Pet. App. 57a-59a). The issue therefore, is not before the Court.

Finally, WMATA contended that respondent Williams' suit was barred as untimely by 33 U.S.C. § 933(b) because it had not been filed within the six-month period fixed by that provision. The Court of Appeals affirmed the District Court's dismissal of Williams' suit (Pet. App. 60a-64a), and this Court denied review. *Williams v. WMATA*, No. 83-822 (Jan. 16, 1984). The District of Columbia Court of Appeals, however, has recently allowed Williams to add WMATA as a defendant in a parallel action brought against Bechtel in the Superior Court of the District of Columbia. *Williams v. Bechtel Assocs. Prof. Corp., D.C.*, No. 82-1413 (D.C. Feb. 15, 1984) (*mem.*).

tem,[16] that the subcontractors on the system had not purchased compensation insurance for their employees, and that WMATA had appropriately purchased (pursuant to Section 904(a)) the requisite insurance that had funded the compensation awards to respondents.[17]

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[16] In five cases, the court specifically made this finding (Pet. App. 1a, 7a, 14a, 24a, 28a), and in the remaining two the finding is a necessary inference from the court's conclusion.

In the *Eighmey* case, for example, the court held that "WMATA is in the position of overall general contractor for subway construction in the Washington, D.C. area, with the responsibility of supervising numerous consultants, general contractors, and subcontractors" (Pet. App. 1a).

In each of the cases below, WMATA filed a sworn affidavit of its Secretary stating that "WMATA, as the general contractor, has contracted with private construction companies, as subcontractors, to build the WMATA subway system" (J.A. 25-28, 31-32, 35-36, 39-40, 43-44). After the District Court judges had granted several of WMATA's motions for summary judgment, counsel for the respondents challenged this sworn statement through motions for reconsideration under Rules 59 and 60(b) of the Federal Rules of Civil Procedure. Judge Flannery allowed counsel for the respondents to conduct complete discovery into this issue. WMATA itself thereafter relied on the resulting discovery in support of its opposition to these motions. Upon review of the discovery, Judge Flannery characterized respondents' contention that WMATA was not a general contractor as nothing more than "verbal gymnastics" (Pet. App. 28a). The remaining District Court judges agreed, two of them awarding WMATA costs and attorneys' fees for being forced to defend itself against the issue (Pet. App. 33a, 34a). Respondents renewed their claim that WMATA is not a general contractor in the Court of Appeals (Brief for Appellants, 1-22), but that court refused to disturb the District Courts' finding (*see* Pet. App. 42a, 49a-57a). Consequently, there is no reason for this Court to reconsider the factual conclusion on this issue by both the trial and appellate courts.

[17] For instance, Judge Corcoran found that "[h]ere, by agreement with its subcontractors, the general contractor, WMATA, became the sole purchaser of workmen's compensation coverage; and it was from that coverage that the plaintiff received his benefits" (Pet. App. 10a). To the same effect are the decisions of the other judges (Pet. App. 1a-2a, 7a, 14a, 20a, 24a, 28a-29a).

Consequently, the district judges uniformly held that WMATA was entitled to *quid pro quo* immunity from the respondents' suits under Section 905(a). For example, in granting judgment for WMATA, Judge Corcoran articulated the common rationale underlying these holdings: "[i]t has long been recognized that the purchase of workmen's compensation coverage and the payment of benefits is the *quid pro quo* for the release under § 905 (a) from common law liability" (Pet. App. 9a) (citations omitted). Similarly, Judge Flannery ruled that:

> Under the WMATA Compact WMATA clearly fulfills the function of overall general contractor of the rapid transit system and, as purchaser of worker's [sic] compensation insurance, is entitled to statutory immunity from suit. [Pet. App. 28a-29a; *see also id.* at 2a, 10a, 16a, 21a, 24a-25a.]

The Court of Appeals' Decision

The Court of Appeals reversed all of the District Court decisions. At the outset, however, the court accepted the basic factual findings made by each District Court judge. Thus, the Court of Appeals acknowledged that: (a) "WMATA exercises the ultimate control of and authority for the construction and operation of the subway system" (Pet. App. 42a); (b) the injured employees "were employed by construction companies under contract to WMATA to construct specific segments of the Metro project" (Pet. App. 49a); (c) "[t]hese subcontractors did *not* purchase workmen's compensation insurance for their employees * * *" (Pet. App. 49a-50a) (emphasis in original); (d) "* * * WMATA purchased such insurance to cover all laborers and other employees working on the Metro system" (Pet. App. 50a); and (e) "[a]fter sustaining an injury, each employee filed for and received workmen's compensation benefits" (*id.*).

Moreover, the Court of Appeals also acknowledged the important legal principles which control the implemen-

tation of the LHWCA. Thus, the court recognized that: (a) the purpose of the LHWCA is "to insure that all employees are covered by worker's compensation insurance and will thereby receive prompt compensation for work-related injuries" (Pet. App. 51a-52a); (b) this purpose is effectuated under the Act by requiring either the immediate employer or the general contractor—on pain of criminal sanctions—to secure and maintain insurance for all employees (*id.*); and (c) "in return for carrying the required insurance," the general contractor receives immunity from tort liability under Section 905(a) (*id.*).

Nevertheless, the court declared that WMATA was not entitled to immunity in exchange for the compensation it had secured and paid for because it was *not required* by Section 904(a) to provide that compensation coverage. Section 904(a) states that "the contractor shall be liable for and shall secure the payment of * * * compensation to the employees of the subcontractor unless the subcontractor has secured such payment." Even though the court acknowledged that, when WMATA purchased insurance, the subcontractors had not in fact "secured such payment," [18] it held that "[t]o benefit from securing the insurance [*i.e.*, to receive immunity], WMATA must *first* require its subcontractors to purchase the insurance" (Pet. App. 54a) (emphasis in original). Since WMATA had not attempted to impose such a requirement, said the court, WMATA had "preempted" its subcontractors' statutory duty (Pet. App. 54a). In the court's view, therefore, the steps taken by WMATA to ensure compensation coverage for all Metro construction employees constituted a *purely voluntary* ex-

[18] Indeed, it is undisputed that none of the subcontractors (or sub-subcontractors) ever purchased any compensation insurance for this project (Pet. App. 51a, 54a, 56a).

penditure of public funds and a "circumventing [of] the statutory scheme" (Pet. App. 56a; *see also id.* at 54a, 55a).[19]

Although nothing in Section 904(a) imposes any duty on a general contractor to "*first* require its subcontractors to purchase the insurance," the court attempted to justify its construction of the statute on essentially three grounds. First, said the court, the LHWCA "must be construed liberally in favor of the injured employee" (Pet. App. 51a, quoting *Potomac Elec. Power Co. v. Wynn*, 343 F.2d 295, 296 (D.C. Cir. 1965)). Second, the court relied on a number of lower-court decisions in which (unlike this case) general-contractor immunity was denied either where the general contractor had purchased *no* insurance, or where a subcontractor had *already* purchased insurance.[20] Finally (and completely contrary to the record[21]), the court determined that WMATA's "deviation from the statutory scheme" had served to "confuse and confound" the respondents concerning who—WMATA or their immediate employers—should be the defendant in any third-party negligence suit.

As we will show, each rationale relied on by the Court of Appeals is without merit, the result it has reached is flatly contrary to the plain language of Section 904, and its decision, if upheld, will subvert the purposes of the LHWCA and produce results never intended by Congress.

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[19] The court also rejected out of hand WMATA's contentions that it had undertaken the wrap-up program as the *only* effective way to ensure employee coverage at all times, to permit minority-contractor participation, and to achieve cost savings in employee coverage on the public's behalf. The court found that none of these factors could "excuse deviation" from its view of "the statutory scheme" (Pet. App. 55a).

[20] *See* pp. 22-23 & n.31, *infra*, for a discussion of these cases.

[21] *See* pp. 23-25, *infra*.

SUMMARY OF ARGUMENT

Section 904 of the LHWCA is simple and straightforward. It requires a general contractor on a construction project to secure workers' compensation coverage for the employees of its subcontractors, "unless the subcontractor has secured" such coverage already. Here, WMATA, acting as general contractor for the construction of the Washington-area Metro system, provided such coverage for all employees engaged in the construction; no subcontractors at any time purchased insurance for any Metro construction employee. Nevertheless, the Court of Appeals held that WMATA *voluntarily* purchased insurance and, as a consequence, is not entitled to immunity from "third-party actions" brought by employees who have already received compensation benefits from coverage purchased by WMATA.

The Court of Appeals' decision is flatly contrary to the plain language of Section 904; no construction of that section can be read to require, as the Court of Appeals said it does, that a general contractor must "*first* require its subcontractors to purchase the insurance (Pet. App. 54a)" before acquiring coverage itself. Nothing in this Court's decisions, any lower-court decisions, or the record in this case justifies such judicial legislation.

Assuming that WMATA fulfilled its duty to secure compensation coverage under Section 904, it is entitled to the same immunity an "employer" would receive under Section 905(a). That entitlement, which the Court of Appeals itself conceded, is the only construction of the LHWCA consistent with the *quid pro quo* underlying the statute. Indeed, a contrary construction would paralyze the operation of the LHWCA in any case where compensation was secured by a general contractor, since that contractor would then have no "employer" obligations to ensure actual delivery of the secured compensation benefits.

While the Court of Appeals' decision may benefit the particular employees who brought suit in this case, it will unquestionably defeat the purposes of the LHWCA and thereby work to the distinct disadvantage of the vast majority of other employees. Thus, if upheld, the decision will raise doubts concerning which general contractors, if any, are required to secure compensation coverage, and it will inevitably create gaps in the necessary coverage. Furthermore, it will encourage contractors and other employers who are made subject to tort suits by the decision below to controvert compensation claims, thereby undermining Congress' avowed intention to ensure swift, certain delivery of no-fault benefits to injured employees. In addition, it will provoke vastly increased tort litigation *against* employers and contractors, and indemnification litigation *between* employers and contractors, all of which the LHWCA was specifically designed to prevent.

Finally, the decision will also produce three other significant, detrimental results that Congress plainly did not intend: it will prevent the use of the most cost-effective, taxpayer-saving method for covering employees—wrap-up insurance; it will lead to conflicting employee recoveries depending on the particular WMATA jurisdiction (D.C., Maryland, or Virginia) in which the injury occurred; and it will necessarily reduce the number of minority contractors who can successfully participate in construction projects, either because such contractors may be unable to acquire the necessary compensation coverage, or because they cannot acquire it at a competitive price.

ARGUMENT

I. THE COURT OF APPEALS' DECISION IS DIRECTLY CONTRARY TO THE PLAIN LANGUAGE OF SECTION 904(a) OF THE LHWCA

A. The Plain Language of the Act Required WMATA To Secure Compensation Coverage

This Court has repeatedly held that where the language of the LHWCA is plain, it should be respected and followed by the courts. *See, e.g., Morrison-Knudsen Constr. Co. v. Director, OWCP*, 103 S. Ct. 2045, 2049 (1983); *Rodriguez v. Compass Shipping Co.*, 451 U.S. 596, 602-603, 616-617 (1981); *Potomac Elec. Power Co. v. Director, OWCP*, 449 U.S. 268, 273-274 (1980) ("*Pepco*").[22] As the Court stated in *Rodriguez*, where the issue concerns the intent of Congress in the LHWCA, "the wisest course is to adhere closely to what Congress has written." 451 U.S. at 617.

That is not the course the lower court followed in this case. Instead, contrary to the straightforward application of Section 904(a) by five District Court judges, the Court of Appeals elected to read into that section a requirement that is simply not there. The section unconditionally states that a general contractor like WMATA "shall be liable for and shall secure the payment of * * * compensation * * * unless the subcontractor has secured such payment." There is no dispute that the subcontrac-

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[22] These cases interpreting the LHWCA follow the well-established tenet of statutory construction that the plain language of a statute "must ordinarily be regarded as conclusive." *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980); *Dickerson v. New Banner Institute, Inc.*, 103 S. Ct. 986, 990 (1983); *American Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982) ("As in all cases involving statutory construction, 'our starting point must be the language employed by Congress' * * * and we assume 'that the legislative purpose is expressed by the ordinary meaning of the words used' ") (citations omitted).

tors in this case had not purchased compensation for this project when WMATA purchased the coverage; that WMATA procured insurance primarily to ensure that continuous, low-cost coverage for *all* employees would in fact be maintained; that WMATA believed with good reason that at least some subcontractors would fail to acquire and maintain coverage; and that its contracts expressly provided that all subcontractors were free to acquire their own insurance. There is furthermore no dispute that WMATA did secure compensation insurance and that respondents have in fact been paid compensation benefits. Finally, the Court of Appeals itself recognized that if WMATA were required by Section 904(a) to secure and pay the benefits which respondents have received, WMATA is entitled to immunity under Section 905(a): "by providing compensation insurance when the subcontractors fail to do so * * * WMATA obtains immunity as a statutory employer" (Pet. App. 54a-55a) (emphasis omitted).[23]

The only dispute, then, is a very narrow one: whether the Court of Appeals' construction of Section 904(a) can be sustained in the face of the plain words of that statute. Those words categorically obliged WMATA to secure compensation in any case where its subcontractors had not already secured it. The Court of Appeals, however, has added *its own* condition to this statute; indeed, the lower court has completely rewritten the statute to provide in essence:

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[23] WMATA does not concede that it is entitled to immunity under Section 905 *only if* it had a "duty" to secure compensation under Section 904. However, since (as we will show) WMATA unquestionably had such a "duty," we do not reach—and the Court need not reach—the question whether WMATA would be entitled to immunity even if it were a "voluntary" compensation-provider as found by the Court of Appeals. Moreover, as we discuss in Part III of our argument (*see* pp. 30-34), if WMATA indeed had no duty to secure compensation, then it also has no duty to pay compensation or to provide any of the other employee benefits stipulated in the LHWCA.

> a contractor need not secure compensation for any subcontractor's employee unless that subcontractor has failed to secure such compensation *and* unless that subcontractor continues in that failure after being required by the contractor to secure the compensation.

Congress arguably could have written such a statute,[24] as, in fact, a few states specifically have done. In Nebraska and Indiana, for example, the legislatures chose to impose this very type of two-step process. Neb. Rev. Stat. § 48-116 (1978); Ind. Code Ann. § 22-3-2-14 (Burns 1974). *See also* N.C. Gen. Stat. § 97-10.1 (1979 repl. vol.). But there can surely be no serious argument that Congress wrote such a provision when it enacted Section 904. That section specifically and unmistakably requires a general contractor such as WMATA to secure compensation unless its subcontractors have already done so. Since here they had not already done so, WMATA was required under Section 904(a) to secure the compensation for respondents, and, as the Court of Appeals conceded, if WMATA was *required to* and did secure compensation, it is entitled to immunity under Section 905(a) (Pet. App. 52a).

B. The Court of Appeals' Clear Disregard of Section 904's Plain Language Cannot Be Justified by the Principle of Liberal Construction, by Previous Lower-Court Decisions, or by Any Alleged "Confusion" of Respondents

The Court of Appeals attempted to justify its departure from the plain language of Section 904 on three grounds. First, the court premised its construction on the proposition that the "Act must be construed liberally in favor of the injured employee" (Pet. App. 51a). Second, it relied on previous lower-court decisions that

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[24] As discussed in Part III of our argument, however, it is highly improbable that Congress would even have considered such a statute since it would run directly counter to the purposes of the LHWCA.

had denied immunity to general contractors on different facts (Pet. App. 52a-54a). Third, it asserted that the effect of WMATA's wrap-up insurance program was to "confuse and confound" the respondents as to the proper third-party defendant, *i.e.*, whether that defendant should be their immediate employer or WMATA (Pet. App. 56a). As explained below, these three asserted grounds provide no justification for the Court of Appeals' redrafting of Section 904.

1. *The Court of Appeals' Redrafting of Section 904 Is Not Excused by the Principle of Liberal Construction*

Although this Court has often used the principle of liberal construction to construe otherwise ambiguous Congressional intent by resolving doubtful language in favor of a particular class, the principle by definition is not a license for courts to rewrite or ignore plain statutory language.[25] The Court of Appeals, therefore, has misused the principle in this case.

Furthermore, even if there were some ambiguity in Section 904—which there is not—in the case of the LHWCA the stated principle in any event requires that the "Act must be liberally construed *in conformance with its purpose, and in a way which avoids harsh and incongruous results.*"[26] That is not what the Court of Appeals has done. The fundamental purpose of the LHWCA—and every other workmen's compensation act—is to guarantee the swift provision of no-fault, compensation benefits to injured employees.[27] As discussed more fully in Part III of our argument, the Court of Appeals'

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[25] *Pepco*, 449 U.S. at 283-284; *accord Rodriguez*, 415 U.S. at 617; *Director, OWCP v. Rasmussen*, 440 U.S. 29, 47 (1979).

[26] *Director, OWCP v. Perini North River Associates*, 103 S. Ct. 634, 647 (1983) (emphasis added) (*quoting Voris v. Eikel*, 346 U.S. 328, 333 (1953)).

[27] *See* authorities discussed on pp. 26-28, *infra*.

decision will in practice subvert those purposes by creating inevitable gaps in employee coverage, slowing down delivery of benefits through the creation of contractor incentives to resist compensation claims, and spawning enormous litigation over responsibility for employee injuries.

The Court of Appeals premised its mistaken view of "liberal construction" on its own earlier decision in *Potomac Elec. Power Co. v. Wynn*, 343 F.2d at 296: " 'Narrow statutory construction should not deprive the injured employee of either his compensation *or his claim in damages against third parties*' " (Pet. App. 51a) (emphasis added). The court failed to note, however, that this Court had unequivocally overruled *Wynn* more than two years before, in *Rodriguez*, 451 U.S. at 614-617. Moreover, the Court of Appeals' statement stands the doctrine of liberal construction on its head and uses it to produce the exact opposite of its true purpose; this is because the court's "liberal" construction for the benefit of the respondents in this tort suit narrows the situations in which full coverage will be provided *for other employees' compensation claims.* While the court may have done a favor for these respondents, it has clearly diminished the compensation rights of a far greater number of workers who in the future will be deprived of the income and medical benefits they need to survive, because general contractors like WMATA will not have guaranteed coverage.[28]

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[28] *See* further discussion in Part III of our argument. This Court need look no further than respondents' brief below to find the most spectacular illustration of what happens when "liberal construction" is given full play in this type of tort case. Respondents' first and principle argument in the Court of Appeals was that WMATA was not a statutory employer at all under Section 904. Brief for Appellants, pp. 1-22. If this argument had succeeded, WMATA would have had no compensation liability and no statutory obligation to see that its subcontractors were insured. In a typical injury to an employee of an uninsured subcontractor that was not

The Court of Appeals has simply treated Section 904 as if it were part of an overall "statutory scheme" to provide tort recoveries to employees. Yet, Section 904 does not contain a word about tort liability.[29] It deals exclusively with compensation liability and insurance. Nevertheless, the court stated that WMATA's wrap-up insurance would "frustrate the operation of the Act"—as if the Act were designed primarily to provide tort recovery. Of course, that is not so. The "operation of the Act" is designed to provide assured compensation benefits—promptly, efficiently, and without dispute. The Court of Appeals' decision will retard, not advance, that operation.[30]

2. *The Lower-Court Decisions Relied Upon by the Court of Appeals Are Inapposite*

The lower-court decisions upon which the Court of Appeals relied (Pet. App. 52a-54a) also fail to justify its departure from the plain language of Section 904. In each of those decisions either (a) the general contractor had not secured workers' compensation insurance *at all*, or (b) the subcontractor had already secured compensation through the purchase of its own insurance. In the first situation, because the general contractor obviously had not met any duty to secure compensation, the courts declined to afford it immunity. In the second situation, because the subcontractor's purchase of workers' compensation insurance was found to have relieved the general

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due to WMATA's negligence, the employee would have no remedy for compensation at all and no remedy in tort against WMATA. It is noteworthy in this connection that a majority of accidents are *not* caused by the negligence of the contractor or subcontractor. *See* 1 A. Larson, *The Law of Workmen's Compensation* 27 (1983).

[29] To the contrary, Congress intended "to minimize the need for litigation as a means of providing compensation for injured workmen." *Rodriguez*, 451 U.S. at 616; *Bloomer v. Liberty Mutual Ins. Co.*, 445 U.S. 74, 86 (1980).

[30] *See* further discussion of this point in Part III of our argument.

contractor of any duty to secure compensation, the general contractor's additional purchase of compensation insurance was deemed an unnecessary act that did not provide the injured employee any added benefit. In both situations, no *quid pro quo* was provided by the general contractor, and hence no immunity was conferred.[31]

Plainly, neither of these two situations is presented here. WMATA alone purchased workers' compensation insurance, and the respondents have received substantial compensation benefits from that insurance (Pet. App. 49a-50a). Accordingly, there has been a *quid pro quo* for the immunity that the Court of Appeals denied to WMATA. Nothing in Section 904 or the cited cases justifies that denial.

3. *WMATA's Wrap-up Insurance Program Did Not "Confuse or Confound" the Respondents*

The final ground relied on by the Court of Appeals underscores its mistaken perception that the LHWCA exists principally to facilitate third-party actions. The

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[31] In *Probst v. Southern Stevedoring Co.*, 379 F.2d 763, 767 (5th Cir. 1967), and *DiNicola v. George Hyman Constr. Co.*, 407 A.2d 670, 671-672 (D.C. App. 1979), only the subcontractor purchased compensation coverage. In *Thomas v. George Hyman Constr. Co.*, 173 F. Supp. 381, 383 (D.D.C. 1959), *both* the subcontractor *and* the general contractor had purchased workers' compensation insurance. Moreover, in *Probst* the Fifth Circuit expressly left open the question whether a general contractor would be entitled to tort immunity if it were actually required to pay compensation to an injured employee.

In *Fiore v. Royal Painting Co.*, 398 So.2d 863, 864 (Fla. App. 1981), the compensation insurance purchased by the subcontractor had lapsed, and the general contractor paid the claim directly; the contractor had not secured compensation by the purchase of insurance. *Cf. Sweezy v. Arc. Elec. Constr. Co.*, 295 N.Y. 306, 67 N.E.2d 369 (N.Y. 1946) (denying immunity to a contractor because the only duty imposed upon the general contractor by the state statute (unlike Section 904 of the LHCWA) was *to pay compensation* benefits if the subcontractor did not *secure* such payment; no general-contractor *duty to secure compensation* was contained in the statute).

court surmised that WMATA's wrap-up insurance program had "confused and confounded" the respondents concerning whether they should sue their immediate employers or WMATA as third parties, causing a possible statute of limitation problem. Accordingly, said the court, the respondents should be permitted to sue WMATA (Pet. App. 56a-57a). It is not at all clear how such "confusion," even if it existed, would justify the court's revision of Section 904. In any event, the "confusion" is completely the court's own invention.

Each of the cases presented here was initially brought against Bechtel alone (J.A. 1, 7, 9, 12, 15, 18, 20). Respondents did not seek an alternate third party to sue until after Bechtel was dismissed on its motion for summary judgment (which did not involve the LHWCA). At that point, any statute-of-limitations bar which respondents might have faced *had already occurred* and had no relationship whatever to the issue whether WMATA or the immediate employers were proper third parties.

Moreover, these respondents and the more than 80 plaintiffs below were represented in their compensation claims by the same counsel of record here. These attorneys cannot—and do not—deny that they knew of the wrap-up insurance program and its consequences long before they filed the complaints against Bechtel. They were plainly not "confused" and the court's supposition that they were cannot justify its decision.

Furthermore, wrap-up programs preclude any confusion about who purchased compensation coverage, because an employee (and his attorney) know for certain that the general contractor has done so. Under the two-step procedure set out by the Court of Appeals, on the other hand, an employee has no way of ascertaining at a given time whether this immediate employer or the general contractor purchased coverage. Should the employee assume that the general contractor successfully required his immediate employer to purchase coverage? Or should he assume that

the immediate employer failed to purchase coverage, that the general contractor *knew* of this failure and then purchased coverage? Or should he assume that both the general contractor and his immediate employer failed to purchase coverage, each mistakenly believing that the other did so? All three assumptions are possible and create confusion not found in a wrap-up program, where an employee knows for certain that the general contractor purchased coverage. Hence, if there is confusion presented in this case, it is the confusion which will flow from the Court of Appeals' own decision.

In summary, the Court of Appeals has, without justification, ignored the plain language of Section 904. That is enough to require reversal of its decision.

II. BY FULFILLING ITS STATUTORY DUTY UNDER LHWCA SECTION 904(a) TO SECURE AND PROVIDE COMPENSATION FOR METRO EMPLOYEES, WMATA BECAME ENTITLED TO IMMUNITY FROM THOSE EMPLOYEES' TORT SUITS UNDER LHWCA SECTION 905(a)

Since WMATA was required under Section 904(a) to secure workers' compensation coverage for respondents (and other Metro construction employees), it follows that WMATA is entitled under Section 905(a) to immunity from respondents' tort suits. Tort immunity has historically gone hand-in-hand with the obligation to secure compensation coverage. *See, e.g., Morrison-Knudsen*, 103 S. Ct. at 2052; *Pepco*, 449 U.S. at 281-282 & n.24. *See also* 2A A. Larson, *The Law of Workmen's Compensation* § 72.31(c), at 14-136 to 14-137. Indeed, even the Court of Appeals recognized that WMATA would be entitled to tort immunity if it had a statutory duty and followed the two-step process imposed by the court (Pet. App. 54a-55a). Moreover, construing the term "employer" in Section 905(a) to include the "contractor" referred to in Section 904(a) is supported by the principle that a statute

should be interpreted, where possible, so as to make its provisions internally consistent. *See, e.g., Morrison-Knudsen*, 103 S. Ct. at 2050-51; *Philbrook v. Glodgett*, 421 U.S. 707, 713 (1975); *Chemehuevi Tribe of Indians v. FPC*, 420 U.S. 395, 403 (1975). *See* further discussion at pp. 30-34, *infra*. Hence, assuming that the Court of Appeals' revision of Section 904 is reversed, it necessarily follows that its decision to deny WMATA immunity must also be reversed.

III. THE COURT OF APPEALS' DECISION WILL SUBVERT THE PURPOSES OF THE LHWCA

In *Pepco*, this Court stated that the federal courts may not rewrite or ignore the plain language of the LHWCA simply to avoid incongruities. 449 U.S. at 283. Here, not only has the lower court rewritten Section 904's compelling language, but that rewrite will itself produce widespread incongruities and inequities under the LHWCA. Indeed, as will be described, the Court of Appeals' decision threatens the very purposes of the LHWCA.[32] This clearly requires reversal of that decision.[33]

The purpose of laws such as the LHWCA and DCWCA, as this Court has long recognized, is to provide "for employees a remedy which is both expeditious and independent of proof of fault," and "for employers a liability which is limited and determinate." *Bradford Elec. Light Co. v. Clapper*, 286 U.S. 145, 159 (1932). *Accord, Cardillo v. Liberty Mutual Ins. Co.*, 330 U.S. 469, 476 (1947). As the Court has also recognized, in order to enjoy these benefits, both employers and employees must give up

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[32] Moreover, as described in Section IV, the decision will also produce numerous other results Congress could not have intended.

[33] *Director, OWCP v. Perini North River Associates*, 103 S. Ct. at 647 ("This Act must be liberally construed in conformance with its purpose and in a way which avoids harsh and incongruous results") (quoting *Voris*, 346 U.S. at 333)); *Reed v. The Yaka*, 373 U.S. 410, 415 (1963).

something. Employers relinquish their tort defenses in exchange for absolute but specifically limited liability, while employees forego the opportunity for unlimited damage awards in return for certain, but limited, compensation awards.[34] To effectuate the trade-off, employers are assured that their no-fault compensation liability is exclusive, and that, accordingly, they are entitled to immunity from tort suits based on the same employee injuries.[35] This trade-off, or *quid pro quo*, is "central to the LHWCA, as adopted by the [DCWCA]." *Pepco*, 449 U.S. at 282 n.24; *accord*, *Morrison-Knudsen*, 103 S. Ct. at 2052.

In short, there are three overriding objectives of the LHWCA: (1) to ensure compensation benefits for all injured employees;[36] (2) to ensure that those benefits, albeit fixed and limited, are swiftly delivered to the injured employees;[37] and (3) to limit litigation concerning

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[34] *See Morrison-Knudsen*, 103 S. Ct. at 2052; *Pepco*, 449 U.S. at 282, n.24; *New York Central R.R. v. White*, 243 U.S. 188, 201-204 (1917); J. Boyd, *A Treatise on the Law of Compensation for Injuries to Workmen Under Modern Industrial Statutes* 4 (1913); 1 A. Larson, *The Law of Workmen's Compensation* § 2.10.

[35] *See e.g.*, *Morrison-Knudsen*, 103 S. Ct. at 2052; *Pepco*, 449 U.S. at 281-282; *Bradford Elec. Light Co.*, 286 U.S. at 159. *See also Lockheed Aircraft Corp. v. United States*, 103 S. Ct. 1033, 1036 (1983).

[36] *See Morrison-Knudsen*, 103 S. Ct. at 2052; *Cardillo*, 330 U.S. at 476.

[37] *See Morrison-Knudsen*, 103 S. Ct. at 2052 (the LHWCA envisions employees' receipt of payments "without the expense, uncertainty, and delay that tort actions entail"); *Pepco*, 449 U.S. at 282 (LHWCA is intended to insure employees a "prompt and certain recovery for their industrial injuries"); *cf. New York Central R.R.*, 243 U.S. at 197 (the expense and delay in litigating the facts of industrial accidents amount "in effect to a defeat of justice"); *Norton v. Warner Co.*, 321 U.S. 565, 568-569 (1944).

employee injuries.[38] In rewriting the statute, the Court of Appeals has completely ignored these statutory objectives and, as a consequence, has reached a decision that will in practice completely undermine each one of them.

A. The Court of Appeals' Decision Will Undermine Congress' Intent to Ensure Employee Compensation Coverage

The immediate and most damaging effect of the Court of Appeals' decision will be to jeopardize Congress' commitment to full compensation coverage for all employees at all times. WMATA's insurance guaranteed just such coverage. Yet under the Court of Appeals' approach, WMATA and other general contractors are enjoined from covering employees unless and until they "*first* require [their] subcontractors to purchase the insurance" (Pet. App. 54a). The court did not say what steps were necessary to qualify for the required coercion against the subcontractor, nor how long the general contractor should wait until concluding that the subcontractors had not in fact acquired the necessary coverage. Indeed, the Court of Appeals' decision provides a contractor *no standard at all* by which to determine when it has ceased being a "mere volunteer" under the LHWCA and has in fact acquired a duty to purchase coverage.[39]

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[38] *See* H.R. Rep. No. 1441, 92d Cong., 2d Sess. 5 (1972); *Rodriguez*, 451 U.S. at 616 (statutory changes adopted in the 1972 amendment "remind us that one of the purposes of the Act is to minimize the need for litigation as a means of providing compensation for injured workmen"); *Bloomer*, 445 U.S. at 86; *cf. New York Central R.R.*, 243 U.S. at 197 (the New York Worker's Compensation Act, on which the LHWCA was based, reflected concern that litigation was "unduly costly and tedious, encouraging corrupt practices and arousing antagonisms between employers and employees").

[39] For that reason, the Court of Appeals' two-step process leaves contractors at sea as to their statutory obligations, unlike contractors governed by state laws that have a defined two-step procedure

The Court of Appeals' standardless "rule" is particularly useless where, as here, WMATA *already knew* that some of its subcontractors would fail to acquire and maintain coverage, but *could never know* which subcontractors those would be. Thus, even had WMATA attempted to follow the Court of Appeals' approach, some subcontractors would no doubt have acquired insurance but then failed to maintain it, and others would never have been able to acquire it at all—and in both situations some coverage failures would not have been brought to WMATA's attention in time for it to supply the missing coverage.[40]

It is therefore inevitable under the Court of Appeals' decision that gaps in coverage will result and that some employees will not have compensation insurance at the time of their injuries. It is also inevitable that some contractors, believing that they have not yet moved from the "volunteer" stage to the "duty" stage, will err on the side of not purchasing insurance.[41] The result, of course, will be to increase still further the gaps in employee coverage.

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spelling out the respective duties of contractors and subcontractors (*see* page 19, *supra*).

[40] WMATA might, for example, have required by contract that all its subcontractors purchase compensation insurance for all their employees. Indeed, as the Fifth Circuit recently recognized, by so acting a general contractor should be deemed to itself have "secured" compensation and therefore be entitled to employer immunity. *Nations v. Sun Oil Co.*, 695 F.2d 933 (5th Cir. 1983) (construing Mississippi workers' compensation statute identical to LHWCA Section 904). Here, WMATA went even further than did the general contractor in *Nations* because it knew that simply requiring its subcontractors to purchase insurance *would not guarantee coverage* for all Metro construction employees.

[41] The Court of Appeals apparently was of the view that a general contractor would *relish* the opportunity to be liable for workmen's compensation, rather than be potentially liable as a third-party tortfeasor: "a general contractor may not circumvent the intended operation of the Act by * * * choosing between either securing workmen's compensation insurance and thereby obtaining statutory employer immunity, or remaining potentially liable as a third-party

Indeed, the Court of Appeals' decision not only will produce a disincentive for general contractors to acquire insurance, but will throw into question whether such contractors have "employer" responsibilities under the Act at all. WMATA had assumed that since it was required to step into the shoes of the employer for purposes of Section 904, it would be treated as an "employer" for purposes of making compensation payments, receiving "employer" immunity, and performing all other "employer" functions under the LHWCA necessary to ensure delivery of compensation benefits. The Court of Appeals, however, has cast doubt on that assumption; under that court's analysis, a "volunteer" such as WMATA has no "employer" duties under the Act. If the Court of Appeals is correct, WMATA (and its carrier) should be entitled to cease making any compensation payments at all. Indeed, if the lower court is right, general contractors may well avoid all responsibility under the LHWCA.

Thus, under Section 904, a "contractor" is "liable for and shall secure payment of" all compensation "payable under Sections 907, 908, 909" of the Act. The latter sections describe, respectively, the medical services, disability compensation, and death benefits made payable under the Act. However, only an "employer" is required under those sections to make those payments (*see* Sections 907(a) and 908(f)). Hence, unless a securing "contractor" is deemed to be an "employer" for purposes of those sections, such a contractor would never be required to make actual provision of the benefits it had secured. Under the Court of Appeals' approach, a volunteer "employer" such as WMATA would apparently have *no duty* to make payments. Obviously, Congress could not have intended such a result; rather, where a "contractor" has secured benefits

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tortfeasor" (Pet. App. 54a). The court has badly misjudged the world of insurance premiums. It would have been *far less expensive* for WMATA to purchase liability insurance than to pay compensation insurance premiums. *See Best's Review*, Jan. 1984, at 94-96.

(under Section 904) and an injured employee appropriately seeks payment of those benefits, it was clearly Congress' intention to treat such a contractor as the "employer" under Sections 907, 908, 909 and to require that the contractor in fact pay the benefits guaranteed by those sections.

Moreover, to ensure effective delivery of those benefits, Congress established a number of penalties, employee-protective prohibitions, and judicial enforcement powers. Again, however, those penalties, prohibitions, and powers were made applicable only to "employers."

Thus, under Section 938 of the Act "any employer" (and its officers) failing "to secure the payment of compensation" required by Section 904 is subject to a fine of $1000 and imprisonment of one year. Similarly, an "employer" is liable (under Section 948) for fines and damages if it discriminates in any way against an employee attempting to prosecute a claim under the Act. An "employer" is additionally subject to civil penalties (under Section 914(g)) for failing to file timely notice with the Secretary of Labor, of compensation payments made. Finally, an "employer" which unsuccessfully resists payment of a claim is subject (under Section 928) to payment of attorney and witness fees incurred by the employee. Yet, if a voluntary securing "contractor" is not treated as an "employer" under the cited sections, then all these sanctions are rendered nugatory in any case where such a contractor might otherwise have been liable for compensation payments under the Act. Under the Court of Appeals' decision, a contractor who had failed to require his subcontractor to obtain insurance would apparently never have been liable in the first place.

Furthermore, Congress provided that an "employer" may be required to make a deposit with the U.S. Treasurer to ensure prompt compensation payments (Section 914(i)) and to post a bond when it seeks to secure payment by qualifying as a self-insurer (Section 932(a)(2));

no "employer" may require any employee to pay any portion of compensation insurance premiums (Section 915); an employee entitled to compensation shall have a lien against its "employer['s]" assets and shall have priority in the event of that employer's insolvency or bankruptcy (Section 914); an "employer['s]" bankruptcy or insolvency will not relieve its insurance carrier of liability for compensation payments (Section 936(a)); the Secretary may "in the interest of justice" approve a lump-sum payment to an employee in discharge of "the liability of the employer for compensation" (Section 914(j)); and a "special fund" for the benefit of employees shall be established and financed in part by "employer" payments and fines (Section 944). All of these sections were plainly intended to benefit employees entitled to compensation under the Act; nevertheless, none of them would apply to a securing "contractor" unless that contractor is treated as a statutory "employer" under the cited sections. And the contractor would apparently not be an "employer" where it had not met the Court of Appeals' test.

Finally, where the "employer" defaults on compensation payments alleged to be due under the Act, the affected employee may seek relief in the federal District Court where the "employer" has its principal place of business or maintains an office (Section 918(a)). In addition, where a resulting judgment cannot be satisfied due to "the employer's insolvency or other circumstances precluding payment," the Secretary may make payments to the employee from the Section 944 "special fund" (Section 918(b)). To the extent that any such "special fund" payments are made, the Secretary is subrogated to the employee's rights "against the employer" (*id.*). An employee has similar enforcement rights in the federal District Court against "any employer" failing to comply with any compensation order issued under the Act (Section 921). However, Congress specifically provided that proceedings for enforcement of compensation orders "shall not be instituted other than as provided in [Section 921] and

Section 918" (Section 921(c)). Hence, since those two sections authorize proceedings only against an "employer," an injured employee would be denied all payment-enforcement rights against a securing contractor unless that contractor is treated as an "employer" for purposes of those sections. Congress must have intended the employee to have those rights even where his general contractor secured the compensation. It is not at all clear that he would have them under the Court of Appeals' decision.

WMATA submits that, where a contractor has had a duty to secure compensation payments under Section 904 and thereafter is asked to pay out the benefits thus secured, the only sensible construction of the Act—the only one that will ensure effective delivery of the legislated employee benefits—is to treat such a "contractor" as a statutory "employer" under the Act in every section that relates to the duty to secure and pay compensation.[42] This includes, of course, the "employer" immunity conferred by Section 905.[43] As Professor Larson has stated, "[s]ince the general contractor is * * * in effect made the employer for purposes of the compensation statute, it is obvious that he should enjoy the regular immunity of an

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[42] It is not our position, of course, that a contractor should thereafter be treated as an "employer" for *all* other purposes under the LHWCA. Such a construction would run counter to the Act's concept that the employer, both in fact and in law, is responsible for the normal incidents of employment. Rather, our contention is that once a claim for compensation is filed and notice is received by the securing contractor's insurer, the contractor should be treated as a statutory "employer" under all sections of the Act which regulate the processing of the claim and the payment of any benefits which are due.

[43] The federal regulations implementing the LHWCA are in accord. *See* 20 C.F.R. § 701.301(a)(13) (1983) (defining "employer" for the purposes of the Act as "any employer *who may be obligated as an employer* under the provisions of the LHWCA as amended or any of its extensions [*e.g.*, DCWCA] *to pay and secure compensation* as provided therein") (emphasis added).

employer * * *." 2A A. Larson, *The Law of Workmen's Compensation*, § 72.31(a), at 14-112. But under the Court of Appeals' approach, it is open to question whether a contractor would ever have an obligation as an "employer" at all. Such a contractor apparently needs only to *fail* to require its subcontractor to acquire insurance and thereby escape responsibilities under the LHWCA altogether.[44]

Alternatively, such a contractor may in good faith purchase insurance, yet learn later that it had not taken sufficient steps, under the Court of Appeals' test, to force the subcontractor to purchase insurance; at that point, the contractor would surely conclude that if it had no duty to purchase insurance, it likewise had no duty to pay compensation. Worse, the involved subcontractor would not itself have purchased insurance, because it would have believed, also in good faith, that the contractor's insurance would suffice to cover any injured worker. Hence, in this all-too-likely situation, even though both the contractor and subcontractor had attempted to follow the Court of Appeals' decision, injured workers would be left without assured compensation benefits.

These results are diametrically opposed to the full employee coverage contemplated by Congress. The Court of Appeals has simply failed to appreciate that the LHWCA, like all statutes, must be construed with a view toward the practical implementation of its stated purposes.[45] Here, WMATA's attempted implementation of the statute is the *only* sensible, practical approach to achieving the statute's purpose: recognizing on the basis

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[44] It is no answer to say that by failing to secure compensation a general contractor might be subject to sanctions under Section 938 of the LHWCA. That section applies only to "any employer required to secure the payment of compensation under this Act." Under the Court of Appeals' decision, WMATA was not required to secure compensation (let alone pay compensation).

[45] *See, e.g., American Tobacco Co. v. Patterson*, 456 U.S. at 66; *Commissioner v. Brown*, 380 U.S. 563, 571-576 (1965); 2A Sutherland, *Statutory Construction*, § 45.12 (4th ed. 1973).

of past experience that some of its hundreds of subcontractors and their sub-subcontractors would not secure coverage, it acquired coverage for *all* Metro construction employees, still leaving to those subcontractors who wished to do so the opportunity to purchase insurance themselves.[46] WMATA's approach will ensure full coverage. The Court of Appeals' standardless rule virtually guarantees that such full coverage will not be achieved.

B. The Court of Appeals' Decision Will Undermine Congress' Intent to Ensure Swift Delivery of Benefits

Denying WMATA immunity will also inevitably frustrate the LHWCA's important interest in assuring employees a prompt and certain disposition of claims and award of benefits. *See, e.g., Morrison-Knudsen*, 103 S. Ct. at 2052; *Cardillo*, 330 U.S. at 476; *Norton v. Warner Co.*, 321 U.S. 565, 568-569 (1944). At present, Metro construction employees can generally obtain compensation benefits without protracted administrative or judicial litigation. That would also appear to be true for employees in general. Less than 5% of all claims require administrative adjudication, and less than 0.1% of all claims reach the Courts of Appeals. *Id.* & n.13; Report of the Comptroller General of the United States, *Longshoremen's and Harbor Workers' Compensation Act Needs Amending* 5, 21, 41 (Apr. 1982). But denying contractors like WMATA immunity from tort suits will surely increase the number of disputes requiring administrative resolution. If they must contemplate subsequent tort suits, contractors will have a greatly enhanced incentive to contest an employee's compensation claims in order to avoid conceding that an employee's injury is work-related, and to avoid providing funds for

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[46] J.A. 283. These record facts contradict the Court of Appeals' completely unsupported conclusion that WMATA acted in order to "preempt" the activity of subcontractors to purchase insurance. *See also* note 41, *supra*.

the tort suit itself.[47] A ruling in favor of respondents, therefore, will invite delay in each individual case as well as substantially increase the number of claims subject to these delays.[48] Any interpretation of Section 904 which threatens to delay so substantially the award of benefits is flatly inconsistent with Congress' intent.

C. The Third-Party Actions Invited by the Court of Appeals Will Create an Unmanageable Litigation Explosion in the Courts Below

The decision below invites any compensation claimant to bring a third-party action against the general contractor, even though the contractor secured the payment of that claimant's compensation benefits. To date, there have been 22,000 compensation claimants, and the Court of Appeals' decision has created a massive spate of third-party actions against WMATA that are continually being filed and have congested the United States District Court for the District of Columbia.[49] Over 80 suits are now pending against WMATA in that court. More suits are being filed at the rate of two to four per week. Approximately 30 suits are pending in the local court of the District of Columbia, and the plaintiffs in those actions have recently been allowed to add WMATA as a new party defendant.[50] (The counsel for these numerous plaintiffs

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[47] *See* S. Rep. No. 1115, 92d Cong., 2d Sess. 4 (1972).

[48] An increase nationwide of merely 5% in the number of cases requiring formal administrative adjudication would double the number of cases the LHWCA administrative system must resolve at a time when that system is already severely overburdened. *See* Report of the Comptroller General of the United States, *Longshoremen's and Harbor Workers' Compensation Act Needs Amending*, at 30-32.

[49] Every active judge of the District Court has been assigned these actions, each of which will involve months of complex discovery and require weeks to try.

[50] WMATA will remove those cases to the United States District Court pursuant to § 81 of the WMATA Compact, D.C. Code Ann., § 1-2431[81] (1981).

are the same counsel of record for the respondents in these cases.) Nor is there any foreseeable end to this litigation. The District of Columbia employs the liberal "discovery rule," which withholds commencement of the limitations period until the plaintiff receives a formal diagnosis of the specific injury alleged in his complaint.[51] Consequently, WMATA will be defending itself against these claims for many years hence if the decision below is not reversed.

Moreover, the expected suits against WMATA are only the beginning of the litigation explosion the Court of Appeals' decision will ignite. That decision allows an injured employee to sue any and all intermediate contractors as well as the general contractor. For example, the employee of a sub-subcontractor can apparently sue the sub-contractor, the contractor, and the general contractor for the same injury.

Furthermore, there will be litigation directly resulting from any gaps in coverage caused by the inevitable termination of wrap-up programs after the Court of Appeals' decision. Section 904 provides injured employees the right either to demand compensation payments or to bring negligence actions against their immediate employers. Undoubtedly, many employees will elect to use the latter alternative, particularly since the affirmative defenses of contributory negligence, assumption of the risk, and the fellow-servant rule will be unavailable to the defendant. *See* Section 905(a). Thus, the practical result of the Court of Appeals' decision will be virtually to guarantee that in all cases of multi-tier employers there will be a third-party tort suit, regardless of who provides compensation coverage.

Finally, if general contractors such as WMATA are to be denied immunity as a *quid pro quo* for their pur-

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[51] *See Wilson v. Johns-Manville Sales Corp.*, 684 F.2d 111 (1982).

chase of compensation coverage, they will naturally seek indemnification agreements from their subcontractors for any negligence claims brought by the latter's employees. Litigation concerning such agreements will inevitably arise and further burden the court system.[52] Indeed, it was this very category of lawsuits that led to the addition of Section 905(b) to the LHWCA, which precludes such indemnity agreements in maritime situations. Since that provision does not apply to land-based actions, however,[53] the court congestion formerly experienced in maritime actions will now be revived in all those cases where land-based general contractors are denied immunity.

At this late date, it hardly needs to be repeated that the litigation that will be formented by the Court of Appeals' decision was precisely what Congress intended through the LHWCA to prevent.[54] Indeed, both this Court and the Congress have found that third-party LHWCA actions needlessly reduce the available funds to pay compensation claims, and that the "primary beneficiaries" of such actions are lawyers, not injured employees.[55] The decision below will simply not assist injured employees in the way Congress intended.

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[52] Dramatic demonstration of the congestion resulting from just such actions was set forth by the court in *Turner v. Transportacion Maritima Mexicana S.A.*, 44 F.R.D. 412 (E.D. Pa. 1968).

[53] *See, e.g., Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 272, n.31 (1979).

[54] *Rodriquez*, 451 U.S. at 616; *Bloomer*, 445 U.S. at 83; *New York Central R.R.*, 243 U.S. at 197.

[55] *Bloomer*, 445 U.S. at 83-86; *Hearings on H.R. 247 et al. Before a Select Subcomm. on Labor of the House Comm. on Education and Labor*, 92d Cong., 2d Sess. 106 (1972).

IV. THE COURT OF APPEALS' DECISION WILL PROVIDE NUMEROUS OTHER RESULTS NOT INTENDED BY CONGRESS, INCLUDING THE PREVENTION OF LOW-COST EMPLOYER COVERAGE, THE CREATION OF CONFLICTING EMPLOYEE RECOVERIES WITHIN THE THREE WMATA COMPACT JURISDICTIONS, AND THE REDUCTION OF MINORITY CONTRACTOR INVOLVEMENT IN CONSTRUCTION PROJECTS

The Court of Appeals' decision not only contradicts the plain language and announced purposes of the LHWCA, but will also produce at least three anomalous results not intended by Congress: the prevention of wrap-up programs such as that used by WMATA, with all its attendant employee and public benefits; divergent liability for WMATA within the interstate Metro System (Maryland, Virginia and the District of Columbia); and the reduction of the number of minority contractors who can participate in construction projects affected by the LHWCA.

A. The Court of Appeals' Decision Will Mark the End of Wrap-Up Programs in Projects Subject to the LHWCA

Without record support, the Court of Appeals has attacked the integrity of wrap-up programs. Its decision will severely diminish the use of this valuable and widely-approved form of comprehensive insurance coverage for large-scale construction projects. Because of the manifold benefits that wrap-up programs provide in a manner that cannot be duplicated by multiple, individual insurance policies,[56] they are now universally em-

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[56] Among the many advantages of wrap-up programs are the following:

Administration. Since all contractors have the same coverage, limits, and policy terms, there is no necessity to review many policies for each construction contract to make certain that coverages afforded are in compliance with contract requirements.

[Footnote continued on page 40]

ployed in large construction projects involving numerous contractors, subcontractors, and sub-subcontractors (J.A.

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[56] [Continued]

Claim Handling. Since the same insurance carrier and staff adjust all claims, this assures a constant uniformity of claims handling for the entire project and eliminates the inconsistencies that would prevail if there were more than one carrier.

Loss Control Engineering. Loss prevention and inspection service are also subject to uniformity because one company supplies the service. This eliminates the variable approach that would be used under conventional methods.

Duplication of Insurance Costs. Only one premium is charged to cover all prime and subcontractors. The alternative would require these contractors, regardless of tier, to supply their own coverages, thus pyramiding insurance costs.

Elimination of Cross-Liability Litigation. The interfacing of one project with another often generates claims by one contractor against another—an expense which carriers anticipate and include in their premiums. This is avoided in the wrap-up program.

Avoidance of Construction Delays. The availability of insurance varies from day to day, and its cancellation, either before or at renewal dates, is always a possibility. If a contractor cannot obtain the coverage required by contract or by law, the construction work must stop. This possibility is eliminated under the wrap-up approach.

Participation by Small and Minority Contractors. As described below, coverage for the majority of these contractors is either not available or is so expensive that it would preclude their participation in the project. The wrap-up program not only provides them an opportunity to participate but assists them in developing greater construction expertise.

Costs. The wrap-up program is primarily loss responsive. That is, each dollar of claim requires a dollar of premium. Charges for the insurance company's expenses and profit have been eliminated. Thus, virtually all premium dollars are used for claim payments.

See, e.g., General Services Administration, *Wrap Up Study* 5-6, 9-10, 11-12, 25 (Aug. 22, 1975); Becker & Denenberg, *Wrap-Up of the Wrap-Up,* CPCU Annals 200 (Sept. 1967). Thus, in addition to meeting WMATA's Section 904(a) duty, wrap-up insurance substantially lessens WMATA's administrative burden and effectuates a substantial savings in costs (J.A. 264). It frees WMATA's public officials to perform other duties, and it lessens the cost to the public of constructing the system—costs that will not be recaptured by future profits (J.A. 291).

286). That wrap-up programs are widely viewed as a valuable method for providing compensation coverage is demonstrated by the fact that they have been approved in one form or another for use in urban transportation construction projects by at least 23 States and the District of Columbia,[57] and are used in a majority of large construction projects in the nation.[58] Indeed, a recent Department of Transportation study concluded that urban transit "[p]rograms and projects of a size greater than $60,000,000 *should be* [comprehensive insurance programs]" like WMATA's.[59]

Moreover, the savings of public funds resulting from its wrap-up program have enabled WMATA to increase the mileage of the system at a time when both federal and state support for mass transit is declining.[60] In addition, the cost savings resulting from wrap-up insurance may be used to finance a centralized safety program to ensure better loss prevention planning.[61] WMATA's wrap-up insurance program does, in fact, use its savings to implement a Coordinated Safety Program, which has become the most successful in the nation.[62]

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[57] Barrett, *Insurance for Urban Transportation Construction*, at A-1 to A-4.

[58] *See* Becker & Denenberg, *Wrap-Up of the Wrap-Up*, at 201.

[59] Barrett, *Insurance for Urban Transportation Construction*, at 6-1 (emphasis added).

[60] Even before WMATA began the Phase II construction of Metro, it was estimated that wrap-up would save taxpayers at least $60 million. *See Subway Insurance Becomes an Issue*, Wash. Evening Star, Feb. 4, 1970, at B1. From 1971 to 1976, WMATA's wrap-up program resulted in an estimated savings in excess of $82 million of public funds. Barrett, *Insurance for Urban Transportation Construction*, at 3-18.

[61] *See, e.g.*, Sullivan, *Casualty Insurance for Contractors*, The Constructor 48 (April 1962).

[62] *See, e.g.*, "Wrap-up Insurance Program at Washington Metro Cuts Insurance Cost, Boosts Worker Safety," Civil Engineering-ASCE 88-89 (April 1978). WMATA's Coordinated Safety Program and Reporting Procedures manual is set forth at J.A. 132-161.

This safety program keeps the responsibility for safety on the contractors, and it employs the National Loss Control Service Corporation ("NATLSCO"), on behalf of WMATA, as an assistant in the field to promote effective safety among all contractor personnel (J.A. 133, 141-143). NATLSCO personnel supplement the safety services provided by WMATA's construction agent in the field.[63] Savings from the wrap-up program are also utilized in the safety program to provide an actual financial incentive through money awards for those subcontractors who meet WMATA's goal of accident-free construction (J.A. at 159-160).

Most important, WMATA's wrap-up program was specifically brought to Congress' attention prior to its implementation in 1971.[64] Shortly after implementation, WMATA's wrap-up program was favorably reviewed by the House Appropriations subcommittee that oversees the federal funding of the entire WMATA project, which includes the funding of the wrap-up program.[65] Since that

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[63] Bechtel's role in the Coordinated Safety Program is set forth at J.A. 146 and is briefly discussed in the Court of Appeals' decision (Pet. App. 47a-49a).

[64] Two members of Congressional House and Senate Committees for the District of Columbia questioned whether WMATA should adopt a wrap-up program. *See Subway Insurance Becomes An Issue*, Wash. Evening Star, Feb. 4, 1970, at B1. The Chairman of the House District Committee, Rep. John L. McMillan, introduced a bill to preclude the use of wrap-up programs in the District of Columbia. H.R. 15627, 91st Cong., 2d Sess. (1970). The District of Columbia opposed the bill, noting that wrap-up programs could "save public money and result in more complete coverage for all concerned" and that wrap-up programs "would make it easier for smaller companies to participate in public construction projects." Letter to The Honorable John L. McMillan from Mr. Graham W. Watt, Ass't to the Commissioner, dated April 3, 1970, and submitted at the April 7, 1970, hearing. A copy of Mr. Watt's letter is included in the Appendix to the National Association of Minority Contractors' Brief *Amicus Curiae*. The bill died in committee.

[65] *See Hearings on Appropriations Before a Subcomm. of the House Comm. on Appropriations*, 92d Cong., 2d Sess. 408, 417-419 (Mar. 20, 1972).

time, Congress has continued to fund the wrap-up program.[66]

Congress' continuing decision to fund WMATA's wrap-up program has proven successful. For over a decade, that program has been responsible for carrying out the primary purpose of the LHWCA and DCWCA by assuring Metro construction laborers of continuous compensation coverage, thereby avoiding the problems occasioned by the history of failures by some of WMATA's subcontractors in obtaining or maintaining their own insurance. At no time prior to this case had anyone ever contended that WMATA had somehow "frustrate[d] the operation of the Act" (Pet. App. 54a) by employing a beneficial, widely-used, and congressionally-funded program of workers' compensation insurance. In these circumstances, WMATA's reasonable, settled expectations that it has been advancing the purposes of the Act, as well as the substantial benefits to contractors, subcontractors, and employees from use of these programs, ought not to be defeated absent some clear Congressional intent to the contrary. *See Morrison-Knudsen*, 103 S. Ct. at 2052; *J.W. Bateson Co. v. United States ex rel. Board of Trustees*, 434 U.S. 586, 593 (1978). *See also Zenith Radio Corp. v. United States*, 437 U.S. 443, 457-458 (1978).

Although the Court of Appeals dismissed as unimportant the undisputed fact that WMATA's insurance program substantially lessened its administrative burden and effectuated a substantial savings in public funds (Pet. App. 55a), it is certain that Congress would not and has not treated this consideration so lightly. Indeed, we suggest that Congress would be astounded to learn that the millions of dollars it has approved for the successful wrap-up insurance program were mere *voluntary contributions* by WMATA to workers who retain the right to sue WMATA for additional compensation for the same injuries. The Court of Appeals' decision necessarily im-

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[66] *See* note 68, *infra*.

plies that that was Congress' intention. The court is clearly wrong and ought to be reversed.

B. The Court of Appeals' Decision Will Subject WMATA to Divergent Liability Within the Interstate Metro System

The Court of Appeals' decision will also create a significant conflict in the recoveries of similarly situated Metro employees. Both Maryland and Virginia clearly bar suits against a general contractor in the circumstances presented here.[67] The court's decision, therefore, has the anamolous effect of denying WMATA immunity *only* for suits that arise in the District of Columbia. That result is intolerable for an interstate agency like WMATA, for whom uniformity in the applicable law is essential. *See* Virginia-Maryland *Amicus Curiae* Br. 4-8.

C. The Court of Appeals' Decision Will Prevent the Bulk of Minority Contractors from Participating In Major Construction Projects Subject to the LHWCA

Finally, the Court of Appeals completely disregarded the effect of its decision on minority-owned and -operated companies, and on WMATA's statutory duty to employ such concerns. As the *amicus* National Association of Minority Contractors ("NAMC") has explained in detail, "[t]he decision below will markedly decrease and probably end the participation of minority contractors in the WMATA project" by, first, "destroy[ing] an insurance program that removed an insurmountable impediment to the participation of minority contractors: the high, and often prohibitive cost of compensation coverage for their

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[67] *See, e.g.*, Va. Code Ann. §§ 65.1-30 & -40 (1980); *Evans v. Newport News Shipbuilding & Dry Dock Co.*, 361 F.2d 364 (4th Cir. 1966); *Anderson v. Thorington Constr. Co.*, 201 Va. 266, 110 S.E.2d 396 (1959), *appeal dismissed for want of a properly presented substantial federal question*, 363 U.S. 719 (1969); Md. Code Ann. Art. 101, § 62 (Michie 1979); *State ex rel. Reynolds v. City of Baltimore*, 86 A.2d 618 (Md. 1952).

employees," and, second, by "drastically reduc[ing] the available federal funds for project construction, because funds must be shifted to cover the costs of the third-party litigation invited by the opinion below" (NAMC Br. 2-3).

WMATA is required by law to provide minority-run companies a maximum opportunity for participation in the construction of the Metro System (J.A. 205-206, 285).[68] Most minority companies engaged by WMATA are small, relatively new concerns which lack the profit margin of larger, more established companies. Because of their relative lack of capital to guarantee continuous and timely premium payments, as well as their brief accident history against which their risk can be measured, these minority firms must often pay a higher compensation insurance premium to obtain coverage from established insurance companies than more established firms with greater equity are forced to pay. In fact, minority companies often cannot obtain compensation insurance from established insurance companies even by paying higher insurance premiums. Hence, if they are

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[68] J.A. 285. Approximately 80% of the construction costs of the Metro Transit System have been subsidized by the transfer of federal Interstate Highway Funds, direct federal lump sum payments, and continuing grants under the Urban Mass Transportation Act of 1964, 49 U.S.C. § 1604. *See* National Capital Transportation Act Amendments of 1979, Pub. L. No. 96-184, 93 Stat. 1320; *see also* S. Rep. No. 475, 96th Cong., 1st Sess. (1979). Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (1976), prohibits any discrimination in federally-funded programs. A similar prohibition is included in Section 12 of the Urban Mass Transportation Act of 1964, as amended, 49 U.S.C. § 1608(f) (1976). The Department of Transportation regulations implementing these statutes require the recipient of federal funds, such as WMATA, to ensure that minority business enterprises have the maximum opportunity to participate in federally-funded projects. *See* 49 C.F.R. §§ 23.1, *et seq.* The District of Columbia and WMATA have furthermore sought to increase minority participation to levels in excess of those required by the federal government. *See, e.g., Metro Is Urged to Set Minority Goals Higher*, Wash. Post, Nov. 24, 1983, at B2.

to have any possibility of participating in WMATA's projects by purchasing workers' compensation insurance themselves, these companies must turn to smaller, financially-weaker, and, as it sometimes turns out, unreliable insurance companies to obtain compensation coverage (J.A. 285-286). That alternative is fraught with risk because employees of such minority companies will be left without any compensation coverage if the insurance company fails (J.A. 265, 285). In addition, denying contractors immunity may encourage them to perform work themselves that they would otherwise let out to a minority subcontractor (*see* NAMC Br. 12).

WMATA's wrap-up program was designed in part to eliminate these problems (J.A. 284-286). Through that program, WMATA is able to provide minority businesses with the opportunity to compete for WMATA's construction projects without the risk that the employees of such firms may be left without compensation coverage (*see generally* NAMC Br.). In that way, WMATA is able not only to satisfy its affirmative action requirements but also to advance the recommendations of the federal government to increase minority participation in the construction industry. For instance, the Urban Mass Transportation Administration of the Department of Transportation has recommended that applicants for federal funding, like WMATA, consider "providing wrap-up insurance for contractors and subcontractors" as a means "to overcome barriers to [minority] program participation" in federally-funded construction projects. Urban Mass Transportation Administration, Department of Transportation, Circular C1165.1, at 14 (Dec. 30, 1977), *superseded by* 49 C.F.R. § 23.45, app. A (1983).[40] The decision below makes it impossible for WMATA to follow that recommendation.

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[40] *See also* Barrett, *Insurance for Urban Transportation Construction*, at 1-21 (recommending wrap-up programs to encourage minority participation in major construction projects); General Services Administration, *Wrap Up Study* 14 (Aug. 22, 1975) (same).

CONCLUSION

The Court of Appeals' judgment is contrary to the plain language of the LHWCA, and will, in practice, subvert the purposes of the LHWCA, produce conflicting interstate recoveries within the Metro system, and debilitate the Congressionally-endorsed wrap-up and minority-hiring programs. It should therefore be reversed and the case remanded with direction to reinstate the judgments of the District Court dismissing the complaints.

Respectfully submitted,

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